INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Reasons for granting the writ	7
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Economy Cab Co. v. *Fahs*, decided May 3, 1949	8
Harrison v. *Greyvan Lines*, 331 U. S. 704	9
Jones v. *Goodson*, 121 F. 2d 176	7, 8, 9
Magruder v. *Yellow Cab Co.*, 141 F. 2d 324	8
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	9
New Deal Cab Co. v. *Fahs*, decided May 3, 1949	8
United States v. *Davis*, 154 F. 2d 314	8
United States v. *Silk*, 331 U. S. 704	9
Woods v. *Nicholas*, 163 F. 2d 615	7
Statutes:	
Internal Revenue Code, Sec. 3612 (26 U.S.C., 3612)	14
Public Law 642, 80th Cong., 2d Sess., enacted June 14, 1948, Sec. 2	9, 13
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 1102	14
Social Security Act, c. 531, 49 Stat. 620:	
Sec. 804 (42 U.S.C. 1004)	11
Sec. 807 (42 U.S.C. 1007)	11
Sec. 811 (42 U.S.C. 1011)	11
Sec. 901 (42 U.S.C. 1101)	12
Sec. 905 (42 U.S.C. 1105)	12
Sec. 907 (42 U.S.C. 1107)	12
Sec. 1101 (42 U.S.C. 1301)	9, 13
Miscellaneous:	
Treasury Regulations 90:	
Art. 205	14
Art. 207	16
Art. 307	17
Treasury Regulations 91:	
Art. 3	14
Art. 15	18
Art. 412	18

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

PARTY CAB COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the District Court (R. 96-104) is reported at 75 F. Supp. 307. The opinion of the Court of Appeals (R. 120-129), together with the dissenting opinion (R. 129-130), is reported at 172 F. 2d 87.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1949. (R. 131.) On April 11, 1949, the time for filing a petition for a writ of certiorari was extended to June 17, 1949, by an order

signed by Mr. Justice Jackson. (R. 132.) The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the drivers of the company's taxicabs were the company's employees and their earnings in 1938 wages subject to the taxes imposed by Titles VIII and IX of the Social Security Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 11-18.

STATEMENT

The Commissioner of Internal Revenue made an assessment of $2,217.26 as taxes, penalties and interest due from the Party Cab Company (hereinafter called the "company") for 1938. The assessment was based upon a determination by the Commissioner that the drivers of the company's taxicabs were employees of the company and their earnings wages subject to the taxes imposed by Titles VIII and IX of the Social Security Act. The Company paid the assessment in 1943 and subsequently filed a claim for refund and instituted this suit in the District Court for recovery of the amount paid. (R. 108.) The District Court denied recovery, upholding the Commissioner's determination as to the status of the company's drivers and the nature of their earnings. (R. 96-104, 109.) On appeal, the decision of the District Court was reversed. (R. 120-129.)

The facts, as set forth in findings of fact of the District Court (R. 105-108), are undisputed.

The company is an Illinois corporation organized "to operate taxicabs and automobiles for hire as a public and private carrier of freight and passengers; to buy and sell and deal in automobiles". During 1938 the company operated its business of taxicab service to the public as hereinafter stated. (R. 105.)

The company had 22 licenses, issued to it by the City of Chicago under city ordinances on the company's application, which authorized it to operate 22 taxicabs for hire. Such licenses are required by the city ordinances for the operation of taxicabs for hire in the city, and taxicabs may not be operated for hire without such licenses. (R. 105-106.)

The company owned, operated and maintained 25 automobiles as taxicabs, equipped for that purpose, all painted in the same manner and bearing the name of the company. In addition, the company owned two automobiles and a repair truck. (R. 106.)

The company secured the necessary state and city licenses, including the hack licenses from the City of Chicago, for the operation of its taxicabs, and the personal injury insurance required by Illinois law. The company was registered with the City of Chicago as the owner of the taxicabs and all licenses are in its name. The company paid the meter inspection fees, the wheel taxes, and for all license fees and taxes levied by the City, the State

of Illinois and the United States, and the personal injury insurance required by Illinois law. (R. 106.)

The company maintained an office from which it conducted its business and at which it received telephone calls for taxicab service. It also had a garage, repair and maintenance equipment where the vehicles were housed and serviced. (R. 106.)

The company was listed in the classified telephone directory as offering taxicabs for hire, maintained two private telephone lines to hotels and employed three telephone operators who received telephone calls for taxi service at the company's office. In addition, the company employed three or more mechanics and tire men to service its vehicles. (R. 106.)

The company's taxicabs were operated by drivers engaged by the company under an oral agreement between the company and the drivers. Under the agreement, which exists only from day to day, a driver was assigned a particular taxicab to drive during a single day or night shift, which shift began and ended at the time determined and fixed by the company. (R. 106.) No driver was permitted to operate the taxicab during a specified shift other than the driver to whom the cab was assigned for that shift. (R. 107.)

When a driver took a taxicab from the company's garage at the beginning of a shift, he first ascertained whether the gasoline tank was filled and whether it was in need of oil. If the taxicab

needed oil or gas, the driver filled the tank with gasoline and put in the necessary oil at his own expense from the supply of gasoline and oil furnished by the company. The drivers were not required to secure the gasoline and oil from the company, but did so as a matter of convenience. When the shift was finished, the driver returned the taxicab to the company's garage where he filled the gasoline tank and put in the necessary oil. At that time he paid the company for the gasoline and oil obtained and also paid a specified amount for the use of the taxicab during the single shift. The drivers retained the fares collected by them from the passengers. (R. 106-107.)

The company paid all expenses incurred in the operation of the taxicabs, including the repairs found necessary during the shift, except for the gasoline and oil used. (R. 107.)

The company's drivers did not own or have any rights in any license which would permit them to operate a taxicab for hire, and the drivers engaged by the company to operate its taxicabs did so only under and through the licenses owned by the company. The drivers had no business telephone and answered telephone calls only through the company's facilities. The drivers did not advertise or have a regular place of business and kept no books or records. The drivers had no capital investment in the performance of the services, no equipment to conserve, and no responsibility for investment or management. (R. 107-108.)

The drivers obtained taxicab business by cruising on the streets or from telephone calls received through the company's office and telephone operators. The only skill the drivers were required to exercise was that of any person who drives a car in the congested traffic of a large city, but the operation of taxicabs for hire in cities is such that drivers must necessarily be permitted a large amount of discretion and latitude in obtaining business and in the driving of the taxicab. (R. 107-108.)

Once a week, and sometimes only once a month, the company called meetings of the drivers to give instructions on such subjects as safe driving, forbidding drinking while on duty, how to avoid accidents, what to do in case of accidents, and what to do with articles left in the cabs by passengers. Occasionally the company's managerial employees would drive around the city streets in the company's automobiles to observe how the drivers operated the taxicabs. (R. 107.)

If a driver had disobeyed any of the company's rules or regulations, the company could have refused to permit the driver to take out and operate its taxicab. (R. 107.)

The trial court found that the company had the right to exercise and did exercise a reasonable amount of control over the methods and means by which the drivers performed their services, and held that the drivers were the company's employees. (R. 108-109.)

The Court of Appeals reversed, holding that, under the common law test approved by Congress in the 1948 amendment to the Social Security Act, the drivers were not employees. (R. 120-129.) Judge Swygert dissented (R. 129).

REASONS FOR GRANTING THE WRIT

This is one of a series of cases involving the status of taxicab drivers as employees under the Social Security Act. The drivers do not own their cabs, but "rent" them on a daily basis from the fleet operator who is the owner and who has the license to engage in the taxicab business. The driver keeps the proceeds over and above the amount paid the owner. Some of the cases differ in details as to the relationship between the owner and the drivers, but the basic plan is the same.

In *Jones* v. *Goodson*, 121 F. 2d 176, the Court of Appeals for the Tenth Circuit, applying the common-law definition of employee, held such drivers (and in addition, some who owned their cabs) to be employees subject to the Social Security Act.[1] Subsequently, the Court of Appeals for the Fourth Circuit and the Court of Appeals for the District of Columbia distinguished *Jones* v. *Goodson* and held in slightly variant factual situations that drivers

[1] In *Woods* v. *Nicholas*, 163 F. 2d 615, the Court of Appeals for the Tenth Circuit held a taxicab company not to be an employer of drivers nearly all of whom were the equitable owners of their cabs, and where the owners and drivers jointly formulated policies and promulgated rules and regulations. The case is thus distinguishable both from *Jones* v. *Goodson* and from the present case. See also facts stated at 163 F. 2d 621.

for other companies were not employees.[2] The present case we believe to be closer on its facts to *Jones* v. *Goodson,* but there are still differences of relatively minor consequence.

Since the decision in the present case, the Court of Appeals for the Fifth Circuit has held cab drivers not to be employees in *New Deal Cab Co.* v. *Fahs,* and *Economy Cab Co.* v. *Fahs,* decided May 3, 1949. Those cases we believe to be indistinguishable on their facts from and therefore in direct conflict with, *Jones* v. *Goodson,* as will appear from the petitions for certiorari which we are filing in them. If this Court grants the petitions in the Fifth Circuit cases, it should hear this case also, inasmuch as the problem is basically the same.

We do not believe that such distinctions as whether the driver is *required* to buy his gasoline from the owning company, or to telephone to the central office hourly, or to drive within the city limits—differences between this case and *Jones* v. *Goodson,*—affect the fundamental nature of the working arrangement. In each case the driver is subject to the control of the cab company to the

---

[2] *Magruder* v. *Yellow Cab Co.,* 141 F. 2d 324 (C.A. 4); *United States* v. *Davis,* 154 F. 2d 314 (App. D.C.). The District Court opinion in the *Yellow Cab* case shows that the drivers there were operating their cabs under an agreement whereby their daily payments would be credited as part of the purchase price of the cabs, and under which they were required to maintain the cabs at their own expense. See 49 F. Supp. 605, 609. In the *Davis* case, the owner and lessor of the cab alleged to be the employer was not the operator of the taxicab company but merely one of the members of a cooperative association; the association was the equivalent of the operating companies involved in the other cases.

extent which the nature of the business permits, and he may lose his means of livelihood any time the company decides to terminate the relationship at will. In any event, it is important for this Court to determine whether differences of this sort are decisive. This case differs materially from those of the truck drivers in *United States* v. *Silk* and *Harrison* v. *Greyvan Lines,* 331 U. S. 704, inasmuch as they owned their equipment and could thus be regarded as independent business men.

The court below (R. 125) distinguished *Jones* v. *Goodson* on the ground that it antedated the 1948 amendment to Section 1101(a)(6) of the Social Security Act, which defined employee as not including "any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or * * * who is not an employee * * *". Pub. Law 642, 80th Cong., 2d Sess., enacted June 14, 1948, *infra,* p. 13. But *Jones* v. *Goodson* applied the common-law test, not the principles subsequently referred to by this Court in *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, and the *Silk* case.

The Bureau of Internal Revenue has advised us that its rulings as to the status of cab drivers involved in the cases in litigation affect about 136,000 drivers. We submit that it is important for this Court to resolve what the court below itself described as "a perplexing problem" as to which "opposing results * * * have been reached" and a

"contrariety of views expressed in a number of cases" (R. 120).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1949

APPENDIX

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

SEC. 804. * * * every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

* * * * *

(42 U. S. C. 1004.)

SEC. 807. * * *

(c) All provisions of law, including penalties, applicable with respect to any tax imposed by section 600 or section 800 of the Revenue Act of 1926, and the provisions of section 607 of the Revenue Act of 1934, shall, insofar as applicable and not inconsistent with the provisions of this title, be applicable with respect to the taxes imposed by this title.

* * * * *

(42 U. S. C. 1007.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *.

(b) The term "employment" means any service, of whatever nature, performed within

the United States by an employee for his employer,

* * * * *

(42 U. S. C. 1011.)

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE

SECTION 901. * * * every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

* * * * *

(42 U. S. C. 1101.)

SEC. 905. * * *

(b) * * * All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926, shall, insofar as not inconsistent with this title, be applicable in respect of the tax imposed by this title.

* * * * *

(42 U. S. C. 1105.)

SEC. 907. When used in this title—

* * * * *

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer,

* * * * *

(42 U. S. C. 1107.)

TITLE XI—GENERAL PROVISIONS

SECTION 1101. (a) When used in this Act—

* * * * *

(6) The term "employee" includes an officer of a corporation.

* * * * *

(42 U. S. C. 1301.)

Public Law 642, 80th Cong., 2d Sess.:

SEC. 2. (a) Section 1101(a)(6) of the Social Security Act is amended by inserting before the period at the end thereof the following: ", but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules."

(b) The amendment made by subsection (a) shall have the same effect as if included in the Social Security Act on August 14, 1935, the date of its enactment, * * *.

* * * * *

Internal Revenue Code:

> SEC. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.
>
> (a) *Authority of Collector.*—If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise.
>
> * * * * *
>
> (26 U. S. C. 3612.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 1102. (a) Every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.
>
> * * * * *

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

> ART. 205.[3] *Employed individuals.*—* * *. The words "employ," "employer," and "employee," as used in this article, are to be taken in their ordinary meaning. * * *

[3] Substantially the same language is contained in Article 3 of Treasury Regulations 91, promulgated under Title VIII of the Social Security Act.

Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee

to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

* * * * *

ART. 207. *Wages.*—The term "wages" means all remuneration for employment, whether payable in money or something other than money. The name by which such remuneration is designated is immaterial. Thus, salaries, commissions on sales or on insurance premiums, fees, and bonuses are wages within the meaning of the Act if payable by an employer to his employee as compensation for services not excepted by the Act. The basis upon which the remuneration is payable, the amount of remuneration, and the time of payment, are immaterial in determining whether the remuneration constitutes "wages." Thus, it may be payable on the basis of piecework, or a percentage of profits; and it may be pay-

able hourly, daily, weekly, monthly, or annually.

The medium in which the remuneration is payable is also immaterial. It may be payable in cash or in something other than cash, such as goods, lodging, food, and clothing.

Ordinarily, facilities or privileges (such as entertainment, cafeterias, restaurants, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a convenience to the employer or as a means of promoting the health, good will, contentment, or efficiency of his employees.

ART. 307. *Records.*—(a) Every person subject to tax under the Act shall, during the calendar year 1936 or any calendar year thereafter, for each such calendar year, keep such permanent records as are necessary to establish:

(1) The total amount of remuneration payable to his employees in cash or in a medium other then cash, showing separately, (a) total remuneration payable with respect to services excepted by section 907 (c), (b) total remuneration payable with respect to services performed outside of the United States, (c) total remuneration payable with respect to all other services.

* * * * *

Treasury Regulations 91, promulgated under Title VIII of the Social Security Act:

ART. 15. *Exclusion from wages.*—The following are excluded from the computation of "wages":

* * * * *

(c) Tips or gratuities paid directly to an employee by a customer of an employer, and not in any way accounted for by the employee to the employer.

ART. 412. *Records.*—(a) *Records of employers.*—Every employer liable for tax shall keep accurate records of all remuneration paid to his employees after December 31, 1936, for services performed for him after such date.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 941402 694